JH Rayner (Mincing Lane) Ltd v Teck Hock & Co (Pte) Ltd & Ors

HIGH COURT (SINGAPORE) — SUIT NO 1219 OF 1987
CHAO HICK TIN JC
30 DECEMBER 1989

Conflict of Laws — Tort, place where committed — Forum non conveniens — Factors to be considered.

Tort — Conversion — Place where occurring

Civil Procedure — Service out of the jurisdiction — Place where tort committed — Rules of the Supreme Court 1970, O 11 rr 1(h), (j), 4(2) & O 15 r 4(1) — Sale of Goods Act 1979 [UK], s 32(1)

The plaintiffs are a company incorporated in the United Kingdom and carrying on business there. They claim against the six defendants for conversion and the recovery of coffee beans or the proceeds thereof. As the second to sixth defendants are resident outside Singapore, the plaintiffs applied for and obtained leave to issue a concurrent writ of summons to be served out of the jurisdiction. The third to sixth defendants entered conditional appearance and asked the court to set aside the said notice. The registrar dismissed the application and the third to sixth defendants (collectively referred to as 'the defendants') appealed. The plaintiffs conceded, in the light of the facts that subsequently emerged, that the plaintiffs have no claim against the fourth to sixth defendants.

Held, dismissing the third defendant's appeal and allowing the appeals of the fourth to sixth defendants:

(1) As a general rule, it is clear that a person who is not the owner and who conveys the goods in question to another without the consent or authority of the owner commits conversion and the person to whom the goods are conveyed obtains no better title to them and may also be liable in conversion. But a mere contract for sale, without a transfer of possession by a non-owner, is not a conversion.

(2) From the documents, the contract appears to be an FOB contract. Secondly, the shipment was to be prompt. Thirdly, the invoice specified that the risk to the goods had passed to the buyer on shipment. Fourthly, the invoice and the bill of lading stated that freight was to be paid by the purchaser and was in fact paid by the purchaser. A prima facie case has been made out that delivery of the coffee beans took place in Singapore and the tort of conversion was committed here.

(3) The fact that the contract price was in US dollars is not decisive and that fact can in no way imply that the contract was subject to US law as was averred by the defendants.

(4) As regards O 11 r 1(1)(j) of the Rules of the Supreme Court 1970 (all references to rules being to O 11 unless stated otherwise), two conditions must be satisfied. First, the writ must be properly brought against a person duly served in Singapore. Secondly, that the person out of the jurisdiction sought to be served is a necessary or proper party.

(5) An action is not 'properly brought' against a defendant within jurisdiction if that action is bound to fail, either on the facts then before the court or on the law. A party who is outside the jurisdiction cannot be a proper party if he has a good defence in law to the claim.

(6) As regards O 15 r 4(1), quite clearly some common questions of law (relating to the first defendant's possession of and entitlement to sell the coffee beans) would arise if separate actions were taken by the plaintiffs against the first and third defendants. The court would also say that the rights to relief claimed by the plaintiffs against the first and third defendants are 'in respect of or arise out of the same ... series of transactions.'

(7) As regards r 4(2), a plea of forum non conveniens can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interest of all the parties and for the ends of justice. The court in considering the question of which is the proper forum, must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense. These factors are not exhaustive and would depend on the ground(s) invoked by the plaintiff in asking the court to exercise its discretion in granting leave. In this case, the principal or most important events relating to the subject matter of this action occurred in Singapore and the main witnesses are in Singapore. The court would grant leave under both sub-paras 1(h) and 1(j).

[*Editorial Note*: The third defendant has appealed to the Court of Appeal vide Civil Appeal No 96 of 1989.]

Cases referred to

1 *Consolidated Co* v *Curtis & Son* [1892] 1 QB 495 (refd)
2 *The 'Brabo'* [1949] AC 326 (refd)
3 *Multinational Gas and Petrochemical Co* v *Multinational Gas and Petrochemical Services Ltd* [1983] 1 Ch 258 (refd)
4 *Massey* v *Heynes & Co* (1888) 21 QBD 330 (refd)
5 *Sim* v *Robinow* (1892) 19 R (Court of Session) 665 (follld)
6 *Spiliada Maritime Corp* v *Cansulex* [1986] 3 All ER 843 (follld)
7 *The 'Abidin Daver'* [1984] AC 398 (follld)
8 *Amin Rasheed Shipping Corp* v *Kuwait Insurance* [1983] 2 All ER 884 (refd)
9 *The 'El Amria'* [1981] 2 Lloyd's Rep 119 (refd)

Legislation referred to

Rules of the Supreme Court 1970 O 11 rr 1(h), (j), 4(2), O 15 r 4(1)
Sale of Goods Act 1979 [UK] s 32(1)

Loo Dip Seng for the plaintiffs.
Yap Wai Ming for the third to sixth defendants.

Cur Adv Vult

Chao Hick Tin JC: This is an appeal by the third to sixth defendants against the decision of the registrar refusing an application by those defendants to set aside a notice of concurrent writ of summons served out of the jurisdiction. The question raised is whether the writ should be served on those defendants who are resident outside Singapore.

By this action, the plaintiffs, a company incorporated in the United Kingdom and carrying on business there, claim against the six defendants named herein for conversion and the recovery of 502.075 metric tonnes of Uganda Robusta coffee beans or the proceeds thereof.

It is alleged in the statement of claim that by a contract dated 13 June 1986, the plaintiffs agreed to sell to the first defendant about 500 metric tonnes of the said coffee

beans. It was a term of the contract that the ownership of the goods remained vested with the plaintiffs until payment was received. Eventually 502,075 metric tonnes of the said coffee beans were shipped from Mombasa to Singapore. The relevant bills of lading, together with the plaintiffs' invoices, were sent to a bank in Singapore for collection by the first defendant against payment. The first defendant failed to collect the documents against payment and without the plaintiffs' consent, knowledge or authority wrongfully obtained possession of the said goods from the vessel.

The plaintiffs further claim that subsequently the first defendant, without title and wrongfully, sold and delivered 350 metric tonnes of the coffee beans to the second defendant and another 149 metric tonnes of the coffee beans to the third or fourth or fifth or sixth defendant. For these two sales, the first defendant were paid by the purchasers the sums of US$1,100,466.72 and US$571,766.40 respectively. The payments were received in Singapore. The sales were expressed to be FOB, Singapore.

In an affidavit filed on 5 May 1987 by one Mr Loo Dip Seng on behalf of the plaintiffs, the material facts as set out above were affirmed.

As the second, third, fourth, fifth and sixth defendants are resident outside Singapore, the plaintiffs applied for and obtained leave to issue a concurrent writ of summons to be served out of the jurisdiction. The plaintiffs relied on O 11 r 1(h) and/or r 1(j) of the Rules of the Supreme Court 1970 ('RSC').

On being served with the notice of concurrent writ of summons, the third to sixth defendants entered conditional appearance, followed by an application to set aside the said notice for want of jurisdiction. Alternatively, they asked the court to set aside the said notice in the exercise of its discretion. In the further alternative, they asked that the proceedings herein against them be stayed. The application was dismissed by the registrar with costs. The third to sixth defendants (hereafter collectively referred to as 'the defendants') appealed against that decision of the registrar. I dismissed with costs the appeal of the third defendant but allowed the appeal with costs in so far as the fourth to sixth defendants were concerned. The third defendant has appealed to the Court of Appeal. I now give my reasons.

The defendants contended that the dispute does not come within the jurisdiction of the High Court. The defendants in an affidavit filed herein on 13 November 1987 said that the contract between the first defendant and the third defendant was negotiated by telephone between Singapore and Oakland California: the offer to sell was made by an officer of the first defendant in Singapore and accepted by one Mr Elroy Fulmer for the third defendant in California. The third defendant denied that the sale was FOB, Singapore and alleged that it was ex-dock, Oakland. Payment was only made well after the goods had arrived at Oakland. The third defendant does not maintain any office or presence (either directly or through agents) in Singapore.

Under O 11 r 1 of the RSC, service of a notice of a writ out of the jurisdiction is permissible with the leave of the court in, inter alia, the following cases:

> (h) if the action begun by the writ is founded on a tort committed within the jurisdiction;...
> (j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto.

Mr Yap for the defendants argued that the tort was in fact committed in the United States. He said that the fact that the contract had an FOB clause did not necessarily mean that it was an FOB contract. He emphasized the fact that delivery was at United States and that was where the tort was committed. However, he conceded that the payment made by the third defendant to the first defendant was on the basis of FOB, Singapore. As regards r 1(j), Mr Yap argued that this rule should be applied with circumspection and that this court should bear in mind the principles governing the plea of forum non conveniens.

Counsel for the plaintiffs conceded, in the light of the facts that subsequently emerged, that the plaintiffs have no claim whatsoever against the fourth to sixth defendants. The sale of the coffee beans in question was from the first defendant to the third defendant. The fourth to sixth defendants, though connected with the third defendant, had nothing to do with the purchase of the coffee beans. It would appear that the plaintiffs were initially uncertain whether the fourth to sixth defendants were in any way involved in the purchase and thus, presumably out of caution, cited them as defendants as well.

From the documents exhibited in the affidavit of Loo Dip Seng filed on 5 May 1987, I see that approximately 147.92 metric tonnes of Uganda Robusta Coffee-beans were sold to the third defendant at the price of 'US$1.60 per lb FOB'. Shipment was to be 'prompt'. Terms of payment were: 'document against acceptance for payment 45 days from date of draft'. The invoice issued by the first defendant on 23 September 1986 stated that the goods were shipped on that same day from Singapore to Oakland by SS Kansai Pioneer V 930 'for account and risk of Messrs Gold Mountain Coffee Ltd'. The amount payable by the third defendant for the goods was US$521,766 and the invoice also stated that 'freight payable at destination'. The bills of lading also indicated that freight was to be collected at destination.

So the first question for my consideration is where the alleged tort of conversion was committed. As a general

rule, it is clear that a person who is not the owner and who conveys the goods in question to another without the consent or authority of the owner commits conversion and the person to whom the goods are conveyed obtains no better title to them and may also be liable in conversion: see 41 *Halsbury's Laws of England* (4th Ed) para 744. But a mere contract for sale, without a transfer of possession by a non-owner is not a conversion: *Consolidated Co* v *Curtis & Son*[1] at p 498.

Schmitthoff's Export Trade (7th Ed) at p 21 states:

> Under the FOB clause the cost of loading the goods into the ship has to be borne by the seller but normally this is included in the freight which has to be paid by the buyer. *The risk with respect to the consignment passes from the seller to the buyer when the goods are shipped; normally this means when they are delivered over the ship's rail. The property in the sold goods likewise passes at that moment unless the passing of the property is postponed by express or implied stipulation ...* (Emphasis added).

Further, s 32(1) of the English Sale of Goods Act 1979, (which applies in Singapore) provides that:

> Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.

As I have mentioned above, counsel for the third defendant contended that the conversion did not take place here but in California. I am unable to accept that contention. Firstly, from the documents, this appears to me to be an FOB contract. Secondly, the shipment was to be prompt. Thirdly, the invoice specified that the risk to the goods had passed to the buyer on shipment. Fourthly, the invoice and the bill of lading stated that freight was to be paid by the purchaser and was in fact paid by the purchaser. In the light of all these circumstances, I am satisfied that a prima facie case has been made out that delivery of the coffee-beans took place in Singapore and the tort of conversion was committed here. The fact that the contract price was in US dollars is neither here nor there. That fact can in no way imply that the contract was subject to US law as was averred by the defendants. The defendants have, however, conceded in an affidavit filed by their solicitor on 24 August 1987 that 'it is difficult to ascertain if the contract was concluded in the United States or Singapore'. Nevertheless, considering all the circumstances, I would be inclined to think that the contract was governed by Singapore law. I am, of course not making a definite ruling on this as I do not think there is any need for me to do so. No evidence has been tendered to me that the United States contract law on the point in issue is different from that which applies in Singapore.

I now turn to consider the case under r 1(1)(j). There are two conditions of which the court must be satisfied. First, the writ must be properly brought against a person duly served in Singapore. Second, that the person out of the jurisdiction sought to be served is a necessary or proper party. There is ample authority (eg *The 'Brabo'*[2]) that an action is not 'properly brought' against a defendant within jurisdiction if that action is bound to fail, either on the facts then before the court or on the law. By analogy, a party who is outside the jurisdiction cannot be a proper party if he has a good defence in law to the claim: see Dillon LJ in *Multinational Gas and Petrochemical Co* v *Multinational Gas and Petrochemical Services Ltd*[3] at p 287. No such submission was made by Mr Yap. But he submitted that this action is not properly or bona fide brought against the first defendant as the only or predominant purpose for which the first defendant has been joined and served is to found an application under r 1(1)(j) for leave to serve the writ on the third to sixth defendants outside Singapore. Nothing in the affidavits filed on behalf of the third defendants supports this contention. I do not think the mere fact that on 22 July 1988 an order of court was made to wind up the first defendant (on the petition of a third party) in any way implies that the action instituted against the first defendant is improper. Prima facie, the plaintiffs have a bona fide claim against the first defendant for conversion. On the facts, I am of the opinion that the third defendant is clearly a proper party to the action and on this point I would adopt what was said by Lord Esher MR in *Massey* v *Heynes & Co*[4] at p 338:

> The question, whether a person out of the jurisdictions is a 'proper party' to an action against a person who has been served within the jurisdiction, must depend on this — supposing both parties had been within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction.

and also by Lindley LJ at the same page:

> When the liability of several persons depends upon one investigation, I think they are all 'proper parties' to the same action, and, if one of them is a foreigner residing out of jurisdiction, r 1(g) (now r 1[1][j]) of RSC O 11, applies.

Further support for this view may also be found in O 15 r 4(1) of the RSC which provides that:

> Subject to Rule 5(1), two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where —
>
> (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and
>
> (b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.

Quite clearly some common questions of law (relating to the first defendant's possession of and entitlement to sell the coffee beans) would arise if separate actions were taken by the plaintiffs against the first defendant and the third

defendant. I would also say that the rights to relief claimed by the plaintiffs against the first and the third defendants are 'in respect of or arise out of the same ... series of transactions'.

Finally, as regards the question of discretion, it has often been emphasized that the courts should exercise great care before they subject to the jurisdiction of these courts a foreigner who owes no allegiance here. That statement of principle is not in dispute. It is the application of that principle to the facts and circumstances of this case that I must consider. As provided in r 4(2) of O 11, no leave to serve a notice of a writ out of the jurisdiction shall be granted 'unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction'. Relying on r 4(2) and invoking the plea of forum non conveniens, Mr Yap submitted that Singapore is not the appropriate forum in so far as the third defendant is concerned.

In *Sim* v *Robinow*[5] at p 668, Lord Kinnear had this to say on the plea of forum non conveniens:

> ... the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.

This plea, which was of Scottish origin, was reviewed and adopted in two recent cases of the House of Lords: *Spiliada Maritime Corp* v *Cansulex*[6] and *The 'Abidin Daver*'[7] at p 411 (per Lord Diplock). But in so far as it is a plaintiff who seeks the leave of court to serve a writ out of the jurisdiction under O 11 r 1, the burden is on the plaintiff to show to the court that Singapore is clearly the appropriate forum for the trial of the action. Order 11 r 4(2) does not spell out the considerations which the court is to take into account in deciding whether the case is a proper one for service out of the jurisdiction. Lord Wilberforce said in *Amin Rasheed Corp* v *Kuwait Insurance*[8] at p 896:

> In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense.

But as Lord Goff pointed out in *Spiliada Maritime*[6] at p 859, these factors are not exhaustive and would depend on the ground(s) invoked by the plaintiff in asking the court to exercise its discretion in granting leave.

In an affidavit filed herein on 14 November 1987 on behalf of the defendants, Mr Kenneth Tan deposed that the action which the third defendant commenced in the Superior Court of California against the plaintiffs with regard to this matter had been withdrawn. This was because the third defendant's US attorneys had not been able to 'establish sufficient contacts of JH Rayner in California to establish jurisdiction in the California court against JH Rayner for [the] purposes of the declaration being sought by the third defendant'.

In the light of this development, and in the absence of any evidence that the court of any third country is the more appropriate forum to adjudicate on the dispute between the plaintiffs and the third defendant, the argument of the third defendant based on the plea of forum non conveniens must fail. The application for a stay of proceedings must, accordingly, also fail. On the facts now before me, undoubtedly the principal or most important events relating to the subject matter of this action occurred in Singapore. It seems to me that the main witnesses are in Singapore. Therefore, I am satisfied that this is clearly a case where leave to serve the writ on the third defendant out of the jurisdiction should be granted. I would grant leave under both sub-paras 1(h) and 1(j).

Finally, it was faintly suggested in an affidavit filed for the defendants that the plaintiffs could easily have brought a suit against the third defendant in California. Even if that were so, I could not see how this point could alter what I have said above. However, I would only like to quote the following observation of Brandon LJ (as he then was) in *The 'El Amria'*[9] at p 128 which I think is just as pertinent to the present case:

> I do not regard it merely as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries.

To my mind, the plaintiffs' claim against the third defendant will raise many issues which are common with their claim against the first defendant. In the premises, and for the reasons aforesaid, I dismissed the appeal of the third defendant but allowed the appeal of the fourth to sixth defendants, in all instances, with costs. The notice issued to the fourth to sixth defendants was set aside.

Order accordingly.

Solicitors: *Ang & Partners*; *Drew & Napier*.

Reported by *Terence Tan Bian Chye*